

the PAP.<sup>176</sup> Therefore, we find that Qwest has an incentive to ensure that its network is functioning appropriately. Qwest's performance on interconnection metrics demonstrates that it provides interconnection in response to competitive LEC orders in compliance with this checklist item. Moreover, interconnection agreement provisions that include alternatives to the SGAT's forecasting provision are available for opt in by competitive LECs.<sup>177</sup> Finally, AT&T has provided no evidence that Qwest's policies here result in decreased trunk blockage performance.<sup>178</sup>

#### B. Checklist Item 4 – Unbundled Local Loops

53. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”<sup>179</sup> Based on the evidence in the record, we conclude, as did the Minnesota Commission,<sup>180</sup> that Qwest provides unbundled local loops in accordance with the requirements of section 271 and our rules.<sup>181</sup> Our conclusion is based on our review of Qwest’s performance for all loop types – which include, as in past section 271 orders, voice grade loops, xDSL-capable loops, and high capacity loops – as well as hot cut provisioning and our review of Qwest’s processes for line sharing and line splitting.<sup>182</sup> As of December 31, 2002, competitors have acquired from Qwest and placed into use approximately 106,827 stand-alone unbundled loops in Minnesota.<sup>183</sup> We note that no commenter raises issues related to Qwest’s provision of unbundled loops in Minnesota.

54. Consistent with the Commission’s prior section 271 orders, we do not address every aspect of Qwest’s loop performance where our review of the record satisfies us that

<sup>176</sup> See Qwest Application, App. E, Minnesota Performance Assurance Plan, App. A at 1 (*Minnesota PAP*); Qwest Reply at 8.

<sup>177</sup> See, e.g., Qwest Application App. L, Vol. 1, Tab 11 (AT&T Interconnection Agreement, App. A, Attach. 3, § 4.1.3.1); Qwest Reply at 7-8; see also *SWBT Texas Order*, 15 FCC Rcd at 18390, para. 78 (explaining that section 252(i) entitles any requesting carrier to seek the same terms and conditions as those contained in an interconnection agreement).

<sup>178</sup> See NI-1 (Trunk blocking); see also *Qwest 9-State Order*, 17 FCC Rcd at 26477-78, para. 320.

<sup>179</sup> 47 U.S.C. § 271(c)(2)(B)(iv); see also Appendix C, paras. 48-52 (regarding requirements under checklist item 4).

<sup>180</sup> See Minnesota Commission Comments at 10-11.

<sup>181</sup> See Qwest Application at 34-42. See generally Appendix B.

<sup>182</sup> Our review encompasses Qwest’s performance and processes for all loop types, but as noted below, our discussion does not address every aspect of Qwest’s loop performance where our review of the record satisfies us that Qwest’s performance is in compliance with the applicable parity and benchmark measures.

<sup>183</sup> See Qwest Application at 35. In Minnesota, as of December 31, 2002, Qwest had in service 98,577 unbundled voice-grade analog loops, 6,928 xDSL-capable loops, 1,322 high capacity loops, and 2,389 unbundled shared loops. See *id.* at 35, 41.

Qwest's performance is in compliance with the parity and benchmark measures established in the state.<sup>184</sup> Instead, we focus our discussion on those areas where the record indicates discrepancies in performance between Qwest and its competitors. In making our assessment, we review performance measurements comparable to those the Commission has relied upon in prior section 271 orders, primarily those associated with measuring the timeliness and quality of loop provisioning and loop maintenance and repair.<sup>185</sup> As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete. Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.<sup>186</sup> We generally find that disparity in one or two months out of the five-month reporting period is isolated and therefore not competitively significant.<sup>187</sup>

55. *xDSL-Capable Loops.* Based on the evidence in the record, we find that Qwest demonstrates that it provides xDSL-capable loops in a nondiscriminatory manner.<sup>188</sup> Although Qwest does not achieve parity under the trouble rate measure of maintenance and repair quality for ISDN-capable loops in Minnesota,<sup>189</sup> we find that these disparities are not competitively significant, given the relatively low competitive LEC trouble rate.<sup>190</sup> We take further comfort in Qwest's implementation of a plan to improve trouble rate performance, including weekly meetings to perform ongoing root-cause analyses to identify and implement appropriate corrective actions.<sup>191</sup> Thus, we find that Qwest's performance with respect to ISDN-capable loops does not warrant a finding of checklist noncompliance.

<sup>184</sup> See, e.g., *Qwest 3-State Order*, para. 94; *Qwest 9-State Order*, 17 FCC Rcd at 26485-86, para. 336.

<sup>185</sup> See *Qwest 3-State Order*, para. 94; *Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

<sup>186</sup> See *Qwest 3-State Order*, para. 94; *Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

<sup>187</sup> See *Qwest 3-State Order*, para. 94; see, e.g., OP-5 (New Service Installation Quality) for DSL-capable loops; MR-3 (Out of Service Cleared within 24 Hours) for line shared loops; MR-6 (Mean Time to Restore) for line shared loops; MR-8 (Trouble Rate) for line shared loops (failing to achieve parity in two of the five relevant months).

<sup>188</sup> See Qwest Application at 36-38; Minnesota Commission Comments at 10-11.

<sup>189</sup> See MR-8 (Trouble Rate) for ISDN-capable loops showing (0.76%, 0.72%, 0.56%, 0.55%, 1.05%) for competitive LECs versus (0.30%, 0.25%, 0.28%, 0.28%, 0.37%) for Qwest retail customers for November 2002 to March 2003.

<sup>190</sup> In Minnesota, the five-month average for the competitive LEC trouble rate is 0.73%. All relevant months and the five-month average for this metric are below 3%, which the Commission has found to be acceptable in past section 271 orders. See *Qwest 9-State Order*, 17 FCC Rcd at 26488, para. 340 n.1237; *Verizon Maine Order*, 17 FCC Rcd at 11691, para. 49 n.209.

<sup>191</sup> See Qwest Application at 37; Qwest Williams Decl., para. 240.

56. In addition, we recognize that Qwest does not meet parity with respect to installation commitments met for conditioned loops in Minnesota.<sup>192</sup> Although Qwest missed the benchmark in three of the relevant months, competitive LEC performance improved each month, with Qwest achieving parity in the most recent months of performance data.<sup>193</sup> Therefore, we do not find that these performance disparities warrant a finding of checklist noncompliance.

57. *High Capacity Loops.* Based on the evidence in the record, we find that Qwest demonstrates that it provides high capacity loops in a nondiscriminatory manner.<sup>194</sup> Qwest, however, does not achieve parity under the trouble rate measure of maintenance and repair quality for DS1-capable loops.<sup>195</sup> Although troubles for competitive LECs were reported slightly more often than for Qwest's retail customers, we find that these disparities are not competitively significant given the relatively low competitive LEC trouble rate.<sup>196</sup> We take further comfort in Qwest's implementation of a plan to improve trouble rate performance for DS1-capable loops, including additional testing during provisioning and repair and additional training for field technicians.<sup>197</sup> Thus, we find that Qwest's performance with respect to high capacity loops does not warrant a finding of checklist noncompliance.

### C. Checklist Item 14 – Resale

58. Section 271(c)(2)(B)(xiv) of the Act requires that a BOC make “telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3).”<sup>198</sup> Based on the evidence in the record, we conclude that Qwest satisfies the requirements of this checklist item.<sup>199</sup> In reaching this conclusion, we recognize that the Minnesota Commission did not make a collective determination with regard to

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<sup>192</sup> See OP-3 (Installation Commitments Met) for conditioned loops showing (54.55%, 77.42%, 87.88%, 94.12%, 96.00%) for competitive LECs versus the 90% benchmark for Qwest for November 2002 to March 2003.

<sup>193</sup> See Qwest Application at 38; Qwest Williams Decl., para. 241.

<sup>194</sup> See Qwest Application at 38.

<sup>195</sup> See MR-8 (Trouble Rate) for DS1-capable loops showing (2.41%, 1.34%, 2.29%, 1.38%, 2.07%) for competitive LECs versus (1.22%, 1.25%, 1.30%, 1.34%, 1.32%) for Qwest retail customers for November 2002 to March 2003.

<sup>196</sup> The five-month average for the competitive LEC trouble rate is 1.89%. All relevant months and the five-month average for this metric are below 3%, which the Commission has found to be acceptable in past section 271 orders. See *Qwest 3-State Order*, para. 97; *Qwest 9-State Order*, 17 FCC Rcd at 26488, para. 340 n.1237; *Verizon Maine Order*, 17 FCC Rcd at 11691, para. 49 n.209.

<sup>197</sup> See Qwest Reply, App. at A-3.

<sup>198</sup> 47 U.S.C. § 271(c)(2)(B)(xiv); see also Appendix C.

<sup>199</sup> Qwest recognizes that it has a concrete and specific legal obligation through its SGAT and state-approved interconnection agreements to make its retail services available for resale to competing carriers at wholesale rates. Qwest Application at 66-70.

this checklist item because the Commissioners were unable to agree on how the unfiled agreement docket affects checklist item 14.<sup>200</sup> Unfiled agreements are discussed in the Public Interest Section, below.<sup>201</sup> The Minnesota Commission concluded that Qwest had resolved all other issues related to compliance with checklist item 14, and no other parties raised issues related to Qwest's compliance with checklist item 14.<sup>202</sup>

**D. Remaining Checklist Items (3, 5-13)**

59. In addition to showing compliance with the statutory requirements discussed above, an applicant for section 271 authority must demonstrate that it complies with checklist item 3 (access to poles, ducts, and conduits),<sup>203</sup> item 5 (unbundled transport),<sup>204</sup> item 6 (unbundled local switching),<sup>205</sup> item 7 (911/E911 access and directory assistance/operator services),<sup>206</sup> item 8 (white pages directory listings),<sup>207</sup> item 9 (numbering administration),<sup>208</sup> item 10 (databases and associated signaling),<sup>209</sup> item 11 (number portability),<sup>210</sup> item 12 (local dialing parity),<sup>211</sup> and item 13 (reciprocal compensation).<sup>212</sup> Based on the evidence in this record, we conclude, as did the Minnesota Commission,<sup>213</sup> that Qwest complies with the requirements of all

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<sup>200</sup> *Id.*

<sup>201</sup> See Section VII.B (Unfiled Interconnection Agreements), *infra*.

<sup>202</sup> Minnesota Commission Comments at 14. See also Minnesota Commission Comments, Separate Statement of Chairman Koppendray; Minnesota Commission Comments, Separate Statement of Commissioner Reha at 26; Minnesota Commission Comments, Separate Joint Statement of Commissioners Scott/Johnson at 33. In an *ex parte* letter filed June 18, 2003, AT&T raises issues relating to UNE-Star as a checklist item 14 violation. UNE-Star issues are addressed in our checklist item 2 discussion. See Section III.A. (Checklist Item 2) at n.30, *infra*; AT&T June 18 *Ex Parte* Letter at 1-4.

<sup>203</sup> 47 U.S.C. § 271(c)(2)(B)(iii).

<sup>204</sup> 47 U.S.C. § 271(c)(2)(B)(v).

<sup>205</sup> 47 U.S.C. § 271(c)(2)(B)(vi).

<sup>206</sup> 47 U.S.C. § 271(c)(2)(B)(vii).

<sup>207</sup> 47 U.S.C. § 271(c)(2)(B)(viii).

<sup>208</sup> 47 U.S.C. § 271(c)(2)(B)(ix).

<sup>209</sup> 47 U.S.C. § 271(c)(2)(B)(x).

<sup>210</sup> 47 U.S.C. § 271(c)(2)(B)(xi).

<sup>211</sup> 47 U.S.C. § 271(c)(2)(B)(xii).

<sup>212</sup> 47 U.S.C. § 271(c)(2)(B)(xiii).

<sup>213</sup> Minnesota Commission Comments at 7-14.

of these checklist items.<sup>214</sup> None of the commenting parties challenges Qwest's compliance with these items.

## V. COMPLIANCE WITH SECTION 271(c)(1)(A)

60. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, the BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).<sup>215</sup> To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."<sup>216</sup> In addition, the Act states that "such telephone exchange service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."<sup>217</sup> The Commission has concluded that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers,<sup>218</sup> and that unbundled network elements are a competing provider's "own telephone exchange service facilities" for purposes of section 271(c)(1)(A).<sup>219</sup> Furthermore, the Commission has held that a BOC must show that at least one "competing provider" constitutes "an actual commercial alternative to the BOC,"<sup>220</sup> which a BOC can do by demonstrating that the provider serves "more than a *de minimis* number" of subscribers.<sup>221</sup> Finally, the Commission has held that Track A does not require any particular level of market penetration, and the D.C.

<sup>214</sup> See Qwest Application at 31-34 (checklist item 3), 42-46 (checklist item 5), 47-48 (checklist item 6), 48-49 (checklist item 7), 52-54 (checklist item 8), 54-56 (checklist item 9), 56-58 (checklist item 10), 58-60 (checklist item 11), 60-62 (checklist item 12), 62-65 (checklist item 13).

<sup>215</sup> 47 U.S.C. § 271(c)(1); Appendix C at paras. 15-16.

<sup>216</sup> 47 U.S.C. § 271(c)(1); Appendix C at paras. 15-16.

<sup>217</sup> 47 U.S.C. § 271(c)(1)(A).

<sup>218</sup> *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20585, para. 85 (1997) (*Ameritech Michigan Order*); see also *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20633-35, paras. 46-48 (1998) (*BellSouth Second Louisiana Order*).

<sup>219</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20598, para. 101.

<sup>220</sup> *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8695, para. 14 (1997) (*SWBT Oklahoma Order*).

<sup>221</sup> *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6257, para. 42; see also *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 78.

Circuit has affirmed that the Act “imposes no volume requirements for satisfaction of Track A.”<sup>222</sup>

61. We find that each of five carriers – AT&T, McLeod, HickoryTech, and NorthStar Access – serves more than a *de minimis* number of business and residential end users predominantly over its own facilities and each represents an “actual commercial alternative” to Qwest.<sup>223</sup> Specifically, AT&T provides telephone exchange service to residential subscribers over its own facilities, UNE-Loops, and the UNE-Platform and serves business subscribers through UNE-Loops and the UNE-Platform.<sup>224</sup> McLeod provides telephone exchange service to business subscribers predominantly through UNE-Loops and the UNE-Platform and serves residential customers primarily through UNE-Loops.<sup>225</sup> HickoryTech provides telephone exchange service to business and residential subscribers predominantly through its own facilities and UNE-Loops.<sup>226</sup> NorthStar Access provides telephone exchange service to business and residential subscribers predominantly through its own facilities and UNE-Loops.<sup>227</sup> We reject Sprint’s argument that, because it believes that Qwest’s estimation of competitive LEC customers for Sprint operations is inadequate, this calls into question Qwest’s estimation of competitive LEC customers as well.<sup>228</sup> Because Qwest provides several methods for estimating the number of competitive LEC residential and business customers involving numerous carriers, we find that Sprint’s concerns, even if warranted, do not rise to the level of challenging the overall conclusion that more than a *de minimis* number of business and residential customers are being served by competitive LECs over their own facilities.<sup>229</sup>

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<sup>222</sup> *Sprint v. FCC*, 274 F.3d at 553-54; see also *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (“Track A does not indicate just how much competition a provider must offer in either the business or residential markets before it is deemed a ‘competing’ provider.”) (*SBC v. FCC*).

<sup>223</sup> Qwest Teitzel Decl., paras. 17-30; Qwest Teitzel Decl., Ex. MN-1 (*citing confidential information*); Qwest Teitzel Decl., Ex. MN-4 at 1-6, 9-15, 26-34, 57-59.

<sup>224</sup> AT&T Broadband provides telephone exchange service to residential subscribers predominantly over its own facilities and AT&T Local Services provides telephone exchange service to business and residential subscribers through UNE-Loops and the UNE-Platform. Qwest Teitzel Decl., Ex. MN-4 at 1-6.

<sup>225</sup> *Id.* at 26-34.

<sup>226</sup> *Id.* at 9-15.

<sup>227</sup> *Id.* at 57-59. Qwest estimates that competing LECs now serve at least 25% of access lines in Minnesota. Qwest Teitzel Decl., paras. 39-40.

<sup>228</sup> Sprint Comments at 9-11.

<sup>229</sup> Sprint Comments at 10. We note that the methods that Qwest uses to estimate the number of lines served by competitors are the same methods used in section 271 applications that the Commission has previously approved. See *Qwest 9-State Order*, 17 FCC Rcd at 26314-19, paras. 21-32; *Qwest 3-State Order*, paras. 15-17.

## VI. SECTION 272 COMPLIANCE

62. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."<sup>230</sup> The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.<sup>231</sup> Together, these safeguards discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.<sup>232</sup> In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.<sup>233</sup> As the Commission stated in prior section 271 orders, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.<sup>234</sup>

63. Based on the record, we conclude that Qwest Corporation (QC) and Qwest LD Corp. (QLDC), its section 272 affiliate, have demonstrated compliance with the requirements of section 272.<sup>235</sup> Further, as discussed below, we conclude that we need not address issues related to the possible provisioning of in-region, interLATA services through Qwest Communications Corporation (QCC) because Qwest has not made an affirmative showing to certify QCC's

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<sup>230</sup> 47 U.S.C. § 271(d)(3)(B); see also Appendix C.

<sup>231</sup> See *Implementation of the Accounting Safeguards under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, 15 FCC Rcd 1161 (2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), First Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997), *aff'd sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999).

<sup>232</sup> See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, para. 15; *Accounting Safeguards Order*, 11 FCC Rcd at 17550, para. 24; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

<sup>233</sup> See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

<sup>234</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346; see *SWBT Texas Order*, 15 FCC Rcd at 18549, para. 395.

<sup>235</sup> QLDC is a switchless reseller which is a wholly-owned subsidiary of Qwest Services Corporation, which in turn, is a wholly owned subsidiary of QCII. QLDC was formed in the face of a number of accounting difficulties which prevented Qwest from certifying whether certain of its financial statements were in compliance with GAAP. *Qwest 9-State Order*, 17 FCC Rcd at 26514, paras. 382-383. As we noted in approving the *Qwest 9-State Order*, the Commission has allowed BOCs considerable flexibility in how they structure their section 272 affiliates. *Id.* at 26517, para. 386.

financial statements pursuant to section 272(b)(2), nor is Qwest relying on QCC to demonstrate compliance with section 272.<sup>236</sup>

64. In the *Qwest 9-State Order*, the Commission noted that its judgment about Qwest's compliance with section 272 is a predictive one, as required by section 271(d)(3)(B) of the Act.<sup>237</sup> Specifically, our task is to determine whether Qwest's section 272 affiliate, QLDC, will be complying with this requirement on the date of authorization, and thereafter.<sup>238</sup>

65. We conclude that Qwest has adequately demonstrated that QLDC will be the entity providing in-region, interLATA service originating in Minnesota.<sup>239</sup> Qwest provides support for its assertion that QLDC complies with the requirements set forth in section 272.<sup>240</sup> Qwest states, however, that it intends to eventually designate QCC as its active section 272 affiliate and to begin providing in-region interLATA services on a facilities basis through QCC.<sup>241</sup> Qwest states that it intends to do this as soon as it is able to certify QCC's financial

<sup>236</sup> The Minnesota Commission does not identify any issues related to Qwest's compliance with section 272. Minnesota Commission Comments at 18.

<sup>237</sup> Several courts have addressed the Commission's discretion to make predictive judgments. In different contexts, the United States Supreme Court has recognized that the Commission must necessarily make difficult predictive judgments in order to implement certain provisions of the Communications Act. See *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-96 (1981) (recognizing that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations) (citing *FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775, 813-14 (1978)); *NAACP v. FCC*, 682 F.2d 993 (D.C. Cir. 1982) ("greater discretion is given administrative bodies when their decisions are based upon judgmental or predictive conclusions"); see also *Pub. Util. Comm'n of State of Cal. v. F.E.R.C.*, 24 F.3d 275, 281 (D.C. Cir. 1994) (acknowledging that predictions regarding the actions of regulated entities are the type of judgments that courts routinely leave to administrative agencies). Indeed, we note that determining whether a BOC's section 271 application meets the requirements of the competitive checklist, the requirements of section 272, and is consistent with the public interest, convenience and necessity requires the Commission to engage in highly complex, fact-intensive analyses. See 47 U.S.C. § 271(d)(3).

<sup>238</sup> Qwest Application at 153-163; see also *Qwest 9-State Order*, 17 FCC Rcd 26303, 26517-27 paras. 393-405. In the *Qwest 9-State Order* and in the *Qwest 3-State Order*, we found that Qwest was in compliance with the section 272 affiliate safeguards. In particular, as in the instant case, we approved Qwest's use of QLDC as its section 272 affiliate. *Qwest 9-State Order*, 17 FCC Rcd at 26517-27, paras. 393-405; *Qwest 3-State Order*, paras. 112-115.

<sup>239</sup> Cf. *AT&T Corp. v. U.S. West Corp.*, 13 FCC Rcd 21438, 21465-66, para. 37 (*Qwest Teaming Order*), *aff'd sub nom. U.S. West Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). In the *Qwest Teaming Order*, the Commission considered the totality of the circumstances, rather than focusing on any one particular activity, in assessing whether the BOC was providing interLATA service within the meaning of section 271. *Id.* In making its determination, the Commission considered several factors, including whether the BOC was effectively holding itself out as a provider of long distance service, and whether the BOC was performing activities and functions that were typically performed by those who are legally or contractually responsible for providing interLATA service to the public. *Id.* Similarly, we consider, for purposes of this section 271 application, the totality of the circumstances in determining whether QLDC is the entity that will be providing originating in-region, interLATA service.

<sup>240</sup> Qwest Application at 102-111.

<sup>241</sup> *Id.* at 103-04.

statements.<sup>242</sup> In the context of this record, however, we need only consider QLDC. Given that we have previously approved an application by Qwest using QLDC as its section 272 affiliate, it is clear that QLDC can serve as the section 272 affiliate here. In the event that Qwest does “merge” QLDC with another entity in the future, Qwest must, of course comply with all of the Commission’s rules.

## VII. PUBLIC INTEREST ANALYSIS

66. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.<sup>243</sup> At the same time, section 271(d)(4) of the Act states that “[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B).”<sup>244</sup> Accordingly, although the Commission must make a separate determination that approval of a section 271 application is “consistent with the public interest, convenience, and necessity,” it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.<sup>245</sup>

67. We conclude that approval of this application is consistent with the public interest.<sup>246</sup> From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in Minnesota’s local exchange markets have been removed, and that these local exchange markets are open to competition. We find further that the record confirms the Commission’s view that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.<sup>247</sup>

68. We disagree with Sprint’s assertions that we must, under our public interest standard, consider a variety of other factors as evidence that the local market is not yet truly open

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<sup>242</sup> *Id.*

<sup>243</sup> 47 U.S.C. § 271(d)(3)(C); Appendix C, paras. 70-71.

<sup>244</sup> 47 U.S.C. § 271(d)(4).

<sup>245</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-06, para. 360 (the public interest analysis may include consideration of “whether approval . . . will foster competition in all relevant telecommunications markets”).

<sup>246</sup> We note that Sprint refers to “price squeeze” but does not state a specific claim supported by pricing or other evidence in order to establish such a violation. Sprint Comments at 3.

<sup>247</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18558-89, para. 419.

to competition, despite checklist compliance.<sup>248</sup> Specifically, Sprint argues that the level of residential competitive LEC entry in Minnesota is low, indicating that granting the current section 271 application is not in the public interest.<sup>249</sup> We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance.<sup>250</sup> Moreover, we note that according to Qwest, competitive LECs serve at least 25 percent of the local market.<sup>251</sup> Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the failure of any number of companies to enter the market in and of themselves do not necessarily undermine that showing. As the Commission has stated in previous section 271 orders, factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.<sup>252</sup>

#### A. Assurance of Future Compliance

69. As set forth below, we find that the PAP that will be in place in Minnesota provides assurance that the local market will remain open after Qwest receives section 271 authorization in this state.<sup>253</sup> We find that this plan will likely provide incentives that are sufficient to foster post-entry checklist compliance. In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market.<sup>254</sup> Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission has stated previously that the existence of a satisfactory performance monitoring and enforcement mechanism would be probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.<sup>255</sup> The Minnesota PAP, in combination with the Minnesota Commission's active oversight of that PAP, and provisions for comprehensive review

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<sup>248</sup> Those factors include the level of competitive LEC market share, the financial strength of competitive LECs, and the failure of other BOCs to enter the market in the application states. Sprint Comments at 4-7.

<sup>249</sup> Sprint Comments at 7-9.

<sup>250</sup> See, e.g., *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77; *Sprint v. FCC*, 274 F.3d at 553-54.

<sup>251</sup> Qwest Teitzel Decl., paras. 39-40.

<sup>252</sup> See *Verizon Pennsylvania Order*, 16 FCC Rcd 17487, para. 126.

<sup>253</sup> Minnesota Commission Comments at 16.

<sup>254</sup> See, e.g., *Verizon Pennsylvania Order*, 16 FCC Rcd at 17487-88, para. 127.

<sup>255</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-98. We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market. These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).

to determine whether modifications are necessary, provide additional assurance that the local market in Minnesota will remain open.

70. The Minnesota PAP closely resembles the PAPs the Commission reviewed in the recently approved *Qwest 9-State Order* and *Qwest 3-State Order*.<sup>256</sup> The Minnesota PAP incorporates the key elements in the Colorado Plan.<sup>257</sup> After an open proceeding including Qwest and competitive LECs, on June 20, 2002, the Minnesota Commission decided to adopt the Colorado Plan with modifications. After further proceedings, on November 26, 2002, the Minnesota Commission ordered Qwest to file the PAP consistent with new approved language.<sup>258</sup> On March 17, 2003, Qwest submitted a revised PAP incorporating commission-ordered language and two additional provisions. The Minnesota Commission and Qwest mutually agreed on the remaining new language changes on April 8, 2003.<sup>259</sup> Qwest filed the revised agreement on April 30, 2003 with the PAP becoming effective on the date of section 271 approval for Minnesota.<sup>260</sup>

71. We conclude that the Minnesota PAP provides incentives to foster post-entry checklist compliance. As in prior section 271 orders, our conclusions are based on a review of several key elements in the performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.<sup>261</sup> The structure of these plans is similar to tiered plans that the Commission approved in the *Qwest 9-State Order*.<sup>262</sup> The PAP places at risk about 40 percent of Qwest Minnesota local operating service net income, which puts it in line with those the Commission has previously considered.<sup>263</sup> The PAP includes provisions for continuing review of the PAP by the Minnesota Commission.<sup>264</sup>

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<sup>256</sup> Qwest Application at 115-17; *Qwest 9-State Order*, 17 FCC Rcd at 26546-48, para. 442; *Qwest 3-State Order*, paras. 120-21.

<sup>257</sup> Qwest Application at 115.

<sup>258</sup> Qwest Application, App. A, Tab 26, Declaration of Mark S. Reynolds (Qwest Reynolds Decl.), paras. 2-18.

<sup>259</sup> Minnesota Commission Comments at 16.

<sup>260</sup> *Minnesota PAP*, para. 18.1; Qwest Reply at 24, n.19; Letter from Melissa Newman, Vice President - Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed May 22, 2003) at 1 & Attach. (Qwest May 22F *Ex Parte* Letter) (attaching a revised Minnesota PAP).

<sup>261</sup> See, e.g., *Qwest 9-State Order*, 17 FCC Rcd at 26546-48, para. 442.

<sup>262</sup> *Id.*

<sup>263</sup> The Minnesota cap is set at 40% of ARMIS Net Return from local services. Qwest Application at 116-17 and Qwest Reynolds Decl., para. 20 & n.8.

<sup>264</sup> *Minnesota PAP*, Section 18.

72. As the Commission has stated in prior orders, the PAP is not the only means of ensuring that a BOC continues to provide nondiscriminatory service to competing carriers.<sup>265</sup> In addition to the monetary payments at stake under each plan, we believe Qwest faces other consequences if it fails to sustain an acceptable level of service to competing carriers, including enforcement provisions in interconnection agreements, federal enforcement action pursuant to section 271(d)(6), and remedies associated with other legal actions.

#### B. Unfiled Interconnection Agreements

73. We agree with the Department of Justice that Qwest's previous failure to file certain interconnection agreements with the Minnesota Commission does not warrant a denial of this application.<sup>266</sup> We conclude, as in the *Qwest 9-State Order* and *Qwest 3-State Order*, that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the Minnesota Commission pursuant to section 252 and the Minnesota Commission acting on Qwest's submission of those agreements.<sup>267</sup> In reaching our conclusion, we note that the Minnesota Commission did not reach consensus agreement on how its public interest analysis should take account of past unfiled agreements.<sup>268</sup>

74. Although this record does not demonstrate ongoing discrimination, parties remain free to present other evidence of ongoing discrimination, for example, through state commission enforcement processes or to this Commission in the context of a section 208 complaint proceeding.<sup>269</sup> Further, to the extent past discrimination existed, we anticipate that any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings.<sup>270</sup>

#### 1. Background

75. *Declaratory Order.* On October 4, 2002, the Commission released a memorandum opinion and order granting in part and denying in part Qwest's petition for declaratory ruling on which types of negotiated contractual arrangements between incumbent LECs and competitive LECs are subject to mandatory filing and state commission requirements

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<sup>265</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4165, para. 430; *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *Verizon Pennsylvania Order* 16 FCC Rcd at 17489, para. 130.

<sup>266</sup> Department of Justice Evaluation at 9-10.

<sup>267</sup> See *Qwest 9-State Order*, 17 FCC Rcd at 26553-77, paras. 453-86; *Qwest 3-State Order*, paras. 124-42.

<sup>268</sup> Minnesota Commission Comments at 17. We note that this is not the first section 271 application that the Commission has granted without the approval of the relevant state commission. See, e.g., *Qwest 9-State Order*, 17 FCC Rcd at 26310, para. 15 & n.31 (noting that the Montana Public Service Commission did not approve Qwest's section 271 application in Montana).

<sup>269</sup> *Qwest 9-State Order*, 17 FCC Rcd at 26554, para. 453.

<sup>270</sup> *Id.*

of section 252(a)(1).<sup>271</sup> In the *Declaratory Order*, the Commission found that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).<sup>272</sup> The Commission also found that, unless the information is generally available to carriers, agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements.<sup>273</sup> Further, the Commission stated its belief that the state commissions should be responsible for applying, in the first instance, the statutory interpretation set forth in the *Declaratory Order*.<sup>274</sup>

76. *State Proceeding.* On February 14, 2002 the Minnesota Department of Commerce (MDOC) filed a complaint against Qwest with the Minnesota Commission alleging that Qwest acted in a discriminatory and anticompetitive manner, in violation of state and federal law, by entering into and failing to file 11 interconnection agreements for state approval.<sup>275</sup> An Administrative Law Judge (ALJ) held a hearing on April 29 and May 2, 2002.<sup>276</sup> On May 24, 2002, the MDOC filed a motion to reopen the record to submit evidence of an additional, oral agreement.<sup>277</sup> The ALJ held a hearing on the twelfth agreement on August 6, 2002.<sup>278</sup> The ALJ issued his recommended decision on September 20, 2002, finding that Qwest had entered into 11 written, and one oral, interconnection agreements with competitive LECs, including Eschelon

<sup>271</sup> *Qwest 9-State Order*, 17 FCC Rcd at 26558, para. 459, citing *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (rel. Oct. 4, 2002) (*Declaratory Order*); *Qwest 9-State Order*, 17 FCC Rcd at 26555, para. 456, citing *Petition for Declaratory Ruling of Qwest Communications International Inc.*, WC Docket No. 02-89 at 3 (2002) (*Qwest Section 252 Petition*). In the *Declaratory Order*, the Commission stated the types of contractual arrangements that need not be filed: (1) settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251; (2) forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement; and (3) agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and that do not otherwise change the terms and conditions of the underlying interconnection agreement. See *Qwest 9-State Order*, 17 FCC Rcd at 26558, para. 459; *Declaratory Order*, 17 FCC Rcd at 19341-43, paras. 9-14.

<sup>272</sup> *Declaratory Order*, 17 FCC Rcd at 19340-41, para. 8.

<sup>273</sup> *Id.* at 19341, para. 9.

<sup>274</sup> *Id.* at 19340, para. 7.

<sup>275</sup> Minnesota Comments, App. D, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Docket No. P-421/C-02-197 (rel. Nov. 1, 2002) at 1.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1-2.

<sup>278</sup> *Id.* at 2. The oral agreement was with McLeod for discounts of 6.5% to 10% for all services McLeod purchased from Qwest from Oct. 2000 through Dec. 2001. Minnesota Comments, App. E, Order Assessing Penalties, Minnesota Docket No. P-421/C-02-197 (rel. Feb. 28, 2003) at 43, 46.

and McLeod, in violation of state and federal regulations.<sup>279</sup> The ALJ found that the agreements should have been filed for Minnesota Commission review.<sup>280</sup>

77. The Minnesota Commission adopted the ALJ's recommendation on November 1, 2002.<sup>281</sup> Of the 12 specific interconnection agreements identified by the MDOC, eight were subsequently canceled, superseded or terminated.<sup>282</sup> Qwest subsequently filed the other four interconnection agreements with the Minnesota Commission immediately prior to filing the instant application.<sup>283</sup> The record indicates that the written and oral unfiled agreements identified in the complaint have either been terminated or were approved by the Minnesota Commission under section 252(e) and are available for opt-in by competitive LECs.<sup>284</sup> No commenter identifies additional current unfiled agreements.

78. In addition to the four unfiled interconnection agreements that were the subject of the complaint proceeding, on March 25 and 26, 2003, Qwest also filed 30 other previously unfiled interconnection agreements with the Minnesota Commission for section 252 review.<sup>285</sup> Qwest asserts that each agreement had been provided to the MDOC during its complaint investigation, but was not included in the February 14, 2002 complaint filed with the Minnesota

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<sup>279</sup> Minnesota Comments, App. D at 4-6.

<sup>280</sup> *Id.* at 4.

<sup>281</sup> *Id.* at 7.

<sup>282</sup> Letter from Melissa Newman, Vice President - Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed May 13, 2003) at 3 (Qwest May 13A *Ex Parte* Letter). We note that all eight of these agreements were terminated prior to filing of the instant application, with the exception of Qwest's unfiled agreement with Covad which was canceled on April 29, 2003. Letter from Melissa Newman, Vice President - Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed May 23, 2003) at 1, n.1 (Qwest May 23A *Ex Parte* Letter).

<sup>283</sup> Qwest May 13A *Ex Parte* Letter at 3. These four agreements were filed with the Minnesota Commission on March 25 and 26, 2003 and included one each with "Small Minnesota CLECs" and USLink, and two with McLeod. *Id.*

<sup>284</sup> Minnesota Commission Comments, App. E, Order Assessing Penalties, Minnesota Docket No. P-421/C-02-197 (rel. Feb. 28, 2003) at 6, 20; Letter from Melissa Newman, Vice President - Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed June 20, 2003) at 1-2 (Qwest June 20B *Ex Parte* Letter). On June 12, 2003, the Minnesota Commission approved 13 of the agreements and approved in part and rejected in part the other 21 previously unfiled agreements. *Id.*, Attach. at 1-6. The provisions that were rejected by the Minnesota Commission are not available to any competitive LEC in Minnesota. *Id.* at 1-2.

<sup>285</sup> Qwest Application at 121-22; Qwest Application, App. P, Vol.1, Tab 16. These 30 agreements were with 17 different competitive LECs.

Commission.<sup>286</sup> Qwest asserts that these interconnection agreements are either order form contracts exempt from section 252 or are settlement agreements.<sup>287</sup>

79. On February 28, 2003, the Minnesota Commission issued an Order Assessing Penalties.<sup>288</sup> Qwest, Eschelon and McLeod filed petitions for reconsideration on March 20, 2003.<sup>289</sup> The Minnesota Commission met on April 8 and 14 to consider the petitions.<sup>290</sup> On April 30, 2003, the Minnesota Commission issued, on its own motion, modifications to the February 28, 2003 penalties order, clarifying and modifying certain sections of that order.<sup>291</sup> Qwest filed with the Minnesota Commission on May 13, 2003 for reconsideration of the April 30, 2003 order.<sup>292</sup> The Minnesota Commission denied Qwest's motion for reconsideration on May 21, 2003.<sup>293</sup> Qwest filed a complaint with the United States District Court for the District of Minnesota on June 19, 2003, alleging violations of the Act, due process and Minnesota law with respect to the Minnesota Commission's findings on liability, restitutional remedy and monetary penalty.<sup>294</sup>

## 2. Discussion

80. Consistent with the *Qwest 9-State Order* and *Qwest 3-State Order*, we find that Qwest's failure to file certain interconnection agreements in Minnesota does not warrant a denial of this application.<sup>295</sup> We conclude that concerns about any potential ongoing checklist

<sup>286</sup> Qwest Application at 121-22; Qwest Application, App. P, Vol.1, Tab 16; Qwest May 13A *Ex Parte* Letter; Letter from Melissa Newman, Vice President - Federal Regulatory, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed May 23, 2003) at 1 (Qwest May 23A *Ex Parte* Letter).

<sup>287</sup> Qwest Application at 123 n.81. Qwest filed the settlement agreements that had ongoing obligations although the MDOC, in its complaint, did not require Qwest to file these settlement agreements. *Id.*

<sup>288</sup> Minnesota Comments, App. E.

<sup>289</sup> Minnesota Reply, App. A, Order After Reconsideration on Own Motion, Minnesota Docket No. P-421/C-02-197 (rel. Apr. 30, 2003) at 1.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 1-14.

<sup>292</sup> Letter from Karen Finstad Hammel, Assistant Attorney General for the Minnesota Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed May 22, 2003) (attaching Minnesota Public Utilities Commission Order Denying Qwest's Second Request for Reconsideration (rel. May 21, 2003)) (Minnesota Commission May 22 *Ex Parte* Letter), Attach. at 2.

<sup>293</sup> *Id.*

<sup>294</sup> Letter from Karen Finstad Hammel, Assistant Attorney General for the Minnesota Commission, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-90 (filed June 23, 2003) (attaching Complaint for Declaratory Judgment and Injunctive Relief to Prevent Enforcement of Public Utilities Commission Orders (filed June 19, 2003)) (Minnesota Commission June 22 *Ex Parte* Letter).

<sup>295</sup> See *Qwest 9-State Order*, 17 FCC Rcd at 26567-75, paras. 473-81; *Qwest 3-State Order*, paras. 138-42.

violations (or discrimination) are met by Qwest's submission of agreements to the Minnesota Commission pursuant to section 252 and by the state acting on Qwest's submission of those agreements.<sup>296</sup> The possibility of noncompliance with section 252 on a going-forward basis, therefore, was eliminated by the Minnesota Commission's approval of these agreements which enables competitive LECs to opt-in to them.<sup>297</sup>

81. Based on the record, we also are not persuaded that the unfiled agreement issue warrants denial of the current section 271 application. First, we reject AT&T's contention that, because Qwest has not yet agreed to pay the penalties assessed by the Minnesota Commission, no remedy for past harm has been made and continuing harm exists.<sup>298</sup> At the outset, we note that this situation is no different than that presented in the prior Qwest applications.<sup>299</sup> In the decisions addressing those applications, we concluded that approval of the application was warranted notwithstanding the pendency of state enforcement proceedings.<sup>300</sup> In our view, completion of these state enforcement proceedings, and payment of any penalties assessed, is not a pre-condition to section 271 approval.<sup>301</sup>

82. The Minnesota Commission provides extended discussion concerning the issue of Qwest's unfiled agreements in its comments on the instant application. The Minnesota Commission Chair believes that "matters regarding any prior discrimination are being fully and appropriately addressed at the state level."<sup>302</sup> One Commissioner states that until Qwest has agreed to ordered restitution, it has not yet fully satisfied her that section 271 approval is in the public interest.<sup>303</sup> Two other Commissioners state that until Qwest implements the ordered penalties and admits to wrong-doing, Qwest's conduct at issue is current and cannot be said to be in the past.<sup>304</sup> The latter three Commissioners believe that Qwest's actions regarding unfiled agreements have been sufficiently egregious to conclude that granting section 271 approval at

<sup>296</sup> See *Qwest 9-State Order*, 17 FCC Rcd at 26567-75, paras. 473-81; *Qwest 3-State Order*, paras. 138-42. Pursuant to section 252(e)(4), these agreements were available for opt-in on June 23, 2003. *Qwest June 20B Ex Parte Letter* at 1-2. See 47 U.S.C. § 252(e)(4). On June 12, 2003, the Minnesota Commission issued orders approving, or approving in part and rejecting in part, each of the 34 previously unfiled agreements. *Qwest June 20B Ex Parte Letter*, Attach. at 1-6.

<sup>297</sup> Similarly, there is no ongoing discrimination for agreements that were canceled, superseded or terminated.

<sup>298</sup> AT&T Reply at 11-12.

<sup>299</sup> *Qwest 9-State Order*, 17 FCC Rcd 26559-60, para. 461; *Qwest 3-State Order*, para. 128.

<sup>300</sup> The Minnesota Commission rendered its penalty order on February 28, 2003 and, on reconsideration, amended that penalty decision on April 30, 2003. Minnesota Comments, App. E; Minnesota Reply, App. A, Order after Reconsideration on Own Motion, Minnesota Docket No. P-421/C-02-197 (rel. Apr. 30, 2003).

<sup>301</sup> *Qwest 9-State Order*, 17 FCC Rcd 26559-60, para. 461; *Qwest 3-State Order*, para. 128.

<sup>302</sup> Minnesota Commission Comments, Separate Statement of Chairman Koppendrayner at 24.

<sup>303</sup> Minnesota Commission Comments, Separate Statement of Commissioner Reha at 28.

<sup>304</sup> Minnesota Commission Comments, Separate Joint Statement of Commissioners Scott/Johnson at 36.

this time is not in the public interest.<sup>305</sup> We note that the statute does not require the Commission to consult with the relevant state commission regarding the public interest requirements of section 271(d)(3).<sup>306</sup>

83. We recognize that the Minnesota Commission failed to reach consensus on whether Qwest's discrimination was in the past or remained ongoing, citing Qwest's appeal of Minnesota Commission-assessed penalties and the unfiled interconnection agreement provisions not yet being available for competitive LEC opt-in. The Minnesota Commission has approved the previously unfiled agreements, however, and competitive LECs can now opt-in to previously unfiled agreements. Consistent with the *Qwest 9-State Order* and *Qwest 3-State Order*,<sup>307</sup> we find that no ongoing discrimination exists now, in light of these actions. The Minnesota Commission appears to apply a standard that differs from the standard we have previously used in reviewing section 271 applications, which is to consider whether all effective agreements with section 251(b) or (c) obligations have been made available for opt-in, thus ensuring that there is no ongoing discrimination in violation of the statute.<sup>308</sup> We do not require the penalty phase of the state proceeding to be complete before we can find no discrimination on a forward-looking basis. We take notice that some of the Minnesota Commissioners have determined that Qwest's actions have been so egregious as to warrant a denial of section 271 authorization. We reach a different conclusion, however, and, in light of its present compliance and all other circumstances discussed in this section, find that Qwest's past conduct does not warrant denial of this application on public interest grounds.

84. Second, we reject AT&T's argument that because the Minnesota Commission has not approved the recently filed "unfiled" agreements in question, that Qwest's discriminatory practices continue.<sup>309</sup> As we found in the *Qwest 9-State Order* and the *Qwest 3-State Order*, Qwest's filing with the Minnesota Commission prior to the filing of the instant section 271 application coupled with the Minnesota Commission's disposition of those filed agreements, eliminate the possibility of ongoing discrimination.<sup>310</sup> Moreover, we are not persuaded by the

<sup>305</sup> Minnesota Commission Comments, Separate Statement of Commissioner Reha at 27-30; Minnesota Commission Comments, Separate Joint Statement of Commissioners Scott/Johnson at 34-38.

<sup>306</sup> 47 U.S.C. § 271(d)(2)(B).

<sup>307</sup> *Qwest 9-State Order*, 17 FCC Rcd 26553-54, para. 453; *Qwest 3-State Order*, para. 124.

<sup>308</sup> 47 U.S.C. §§ 251(b)-(c); 252 (a), (d), (e), (i); 271(c)(2)(B).

<sup>309</sup> AT&T Comments at 15-16; AT&T Reply at 2. We note that at the time AT&T filed its comments and reply comments, the Minnesota Commission had not acted on the 34 previously unfiled agreements Qwest filed immediately prior to filing the instant application. The Minnesota Commission has since issued orders approving, or approving in part and rejecting in part, each of the 34 previously unfiled agreements. Qwest June 20B *Ex Parte* Letter, Attach. at 1-6.

<sup>310</sup> *Qwest 9-State Order*, 17 FCC Rcd 26568-69, para. 474; *Qwest 3-State Order* at para. 132. Qwest has persuasively explained that all previously unfiled agreements were either filed, expired, terminated, superseded, did not contain ongoing section 251(b) or (c) obligations, or simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251. See, e.g., Qwest May 13A *Ex Parte* (continued....)

record in the instant application that there is any evidence of additional unfiled agreements, either written or oral.<sup>311</sup> The Minnesota Commission has thoroughly investigated this issue and has not found any other unfiled agreements.

85. We recognize that the Minnesota Commission has aggressively pursued the issue of unfiled interconnection agreements, and we believe that it will continue its diligent monitoring. Based on the demonstrated vigorous attention given the unfiled agreements issue by the Minnesota Commission and lack of evidence to the contrary, we reject AT&T's argument that non-written agreements may still be in effect.<sup>312</sup> Should allegations of additional unfiled agreements arise in the future, we are confident that these issues can be addressed through federal or state complaint or investigatory proceedings.

86. Third, we reject AT&T's contention that we should deny this application because the state record was compromised by the existence and application of provisions in the unfiled agreements.<sup>313</sup> Specifically, AT&T contends that both Eschelon and McLeod refrained from participating in the state section 271 proceeding, per written and oral unfiled agreements, and that they were the only two competitive LECs providing service through UNE-Star.<sup>314</sup> Because commercial UNE-Star OSS performance data was used by Qwest to demonstrate checklist compliance, AT&T contends the state record is compromised.<sup>315</sup> The Minnesota Commission itself did not reach a collective decision that the state record was compromised by unfiled agreements.<sup>316</sup> We note, however, that UNE-Star is being converted to UNE-Platform in Minnesota and that current commercial performance data Qwest provided in support of the instant application does not predominately rely on UNE-Star.<sup>317</sup> Moreover, we note that the facts concerning unfiled agreements in Minnesota are essentially the same as those that were examined by the 12 other state commissions upon which we relied in approving Qwest's section

(Continued from previous page)

Letter (containing a matrix of the 12 previously unfiled agreements subject to the state penalty order); Qwest May 23A *Ex Parte* Letter, Attach.

<sup>311</sup> AT&T contends that because Qwest has maintained no oral agreements existed in Minnesota, contrary to state findings, Qwest must "prove (not just assert) that it has no outstanding oral secret deals." AT&T Comments at 16.

<sup>312</sup> AT&T Comments at 9-10, 16. We note that it is unclear what evidence AT&T proposes Qwest provide to prove additional unfiled agreements do not exist beyond the assertion under oath that Qwest has made to date.

<sup>313</sup> AT&T Reply at 14-15.

<sup>314</sup> *Id.* at 4.

<sup>315</sup> *Id.* at 15.

<sup>316</sup> In a separate statement, two commissioners expressed concern that not having Eschelon and McLeod in the state proceedings was detrimental. Minnesota Commission Comments, Separate Joint Statement of Commissioners Scott/Johnson at 35.

<sup>317</sup> *See supra* n.275.

271 applications in the *Qwest 9-State Order* and the *Qwest 3-State Order*.<sup>318</sup> We are not persuaded to take a different approach here.

87. We do not address past alleged violations of section 251 that may have occurred as a result of Qwest's delay in filing certain previously unfiled agreements. Although we conclude that this record does not demonstrate ongoing discrimination, parties remain free to present other evidence of such discrimination, for example, through state or FCC enforcement processes.<sup>319</sup> Further, to the extent any past discrimination existed, we anticipate that any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings.<sup>320</sup>

88. *Complete-as-Filed Rule.* We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules<sup>321</sup> to the limited extent necessary to consider the Minnesota Commission's disposition of Qwest's submission of previously unfiled agreements.<sup>322</sup> Additionally, we waive the complete-as-filed rule on our own motion to consider the termination of Covad's unfiled agreement on April 29, 2003.<sup>323</sup> The complete-as-filed rule requires a BOC to include in its application all factual evidence on which it would have the Commission rely in making its section 271 determination.<sup>324</sup> As of the date Qwest filed its section 271 application, it had not demonstrated compliance with the non-discriminatory requirements of section 271 because it had not yet received section 252 approval of all interconnection agreements. Further, it had an outstanding unfiled interconnection agreement

<sup>318</sup> *Qwest 9-State Order*, 17 FCC Rcd at 26553-77, paras. 454-86; *Qwest 3-State Order*, paras. 124-37.

<sup>319</sup> *Qwest 9-State Order*, 17 FCC Rcd at 26554, para. 466. See also *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6355, para. 230 ("As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes."); *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6246, para. 19 ("[T]here will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about the precise content of an incumbent LEC's obligations to its competitors – disputes that our rules have not yet addressed and that do not involve *per se* violations of self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.") (citing *American Tel. and Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000); *SWBT Texas Order*, 15 FCC Rcd at 18366-18367, paras. 25-26; *Verizon Pennsylvania Order*, 16 FCC Rcd 17487, para. 126.

<sup>320</sup> *Qwest 9-State Order*, 17 FCC Rcd at 26553, para. 453; *Qwest 3-State Order*, para. 124.

<sup>321</sup> 47 C.F.R. § 1.3.

<sup>322</sup> We refer to the contracts Qwest filed with the Minnesota Commission on March 25 and 26, 2003. Qwest Application at 121 n.78; Qwest May 13A *Ex Parte* Letter at 3. See *Qwest 9-State Order*, 17 FCC Rcd at 26571-72, para. 478 n.1746.

<sup>323</sup> Qwest May 13A *Ex Parte* Letter at 3; Qwest May 23A *Ex Parte* Letter at 1 n.1.

<sup>324</sup> *Comments Requested in Connection with Qwest's Section 271 Application for Minnesota*, Public Notice, WC Docket No. 03-90, DA 03-1019 at 3-4 (rel. Mar. 28, 2003).

with Covad. In order for this Commission to consider the Minnesota Commission's actions on the agreements pursuant to section 252, a waiver of the complete-as-filed rule is necessary.

89. The Commission maintains this procedural requirement to ensure that interested parties have a fair opportunity to comment on the BOC's application, the state commission can fulfill its statutory consultative role, and the Commission has adequate time to evaluate the record.<sup>325</sup> The Commission can waive its procedural rules, however, if "special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."<sup>326</sup> We conclude, based on the circumstances presented here, that special circumstances warrant a waiver of our rule, and that such waiver will serve the public interest.

90. We conclude that the special circumstances before us here warrant a deviation from the general rules for consideration of late-filed information or developments that take place during the application review period.<sup>327</sup> In particular, as we discuss below, we find that the interests our normal procedural requirements are designed to protect are not affected by our consideration of Minnesota's disposition of Qwest's previously unfiled agreements or of the timing of the termination of the Covad agreement. In addition, we conclude that consideration of the state's disposition of Qwest's filed agreements will serve the public interest.

91. It is important to note that the Commission has not established a set of factors that must be met in order for the Commission to waive this procedural rule. Indeed, by the very term "special circumstances" it is understood that the facts surrounding new information provided in any given application would be unique. Consequently, it is within our discretion, taking into account any special circumstances, not to afford greater weight to a particular factor used by the Commission in a previous section 271 order. The grant of this waiver permits the Commission to act on this section 271 application quickly and efficiently. In this proceeding, no purpose would be served by restarting the 90-day procedural clock. On the day Qwest filed the instant application it was evident that by day 88 of our 90-day section 271 review period, the Minnesota Commission would have completed its section 252 review. Thus, there is no longer ongoing discrimination with respect to Qwest's previously unfiled agreements. Given these circumstances and the fact that interested parties have had a meaningful opportunity to comment on these previously unfiled agreements, we do not believe the public interest would be best served in this instance by strict adherence to our procedural rules. As discussed below, however, this waiver of our section 271 procedural requirements in no way should be viewed as a conclusion that such matters do not warrant further investigation.

92. Furthermore, the concrete and limited nature of the Minnesota Commission's action with respect to each interconnection agreement, while critical to the Commission's section 271 approval (because it allows competitors to opt-in to previously unfiled interconnection

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<sup>325</sup> *Qwest 9-State Order*, 17 FCC Red at 26575, para. 482.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 26576, para. 483.

agreements), places no additional analytical burden on commenters or the Commission because the analysis of the interconnection agreements was performed by the Minnesota Commission.

93. For these reasons, we find that the circumstances present in this instance warrant waiver of our procedural requirements, and allow consideration of the termination of the Covad agreement and the disposition of Qwest's previously unfiled agreements by the Minnesota Commission. We conclude that the grant of this waiver to permit consideration of the termination of the Covad agreement and approval of the Minnesota Commission of the 34 previously unfiled interconnection agreements is preferable to requiring Qwest to refile this section 271 application and restart the 90-day clock. At the same time, we are seriously troubled by Qwest's decision to delay filing 34 agreements with the Minnesota Commission until March 25-26, 2003, and refer this matter to the Enforcement Bureau for investigation and appropriate enforcement action. The Commission clarified the incumbent LECs' obligation to file interconnection agreements under section 252(a)(1) in a Declaratory Ruling on October 4, 2002, nearly six months before Qwest filed the Minnesota agreements.<sup>328</sup> We note that Qwest has provided no explanation in the record for this delay in filing the interconnection agreements. Given that it had adequate notice of its legal obligations under section 252(a), we intend to review with careful scrutiny any explanation that Qwest may provide in the context of a potential enforcement action.

#### VIII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

94. Section 271(d)(6) of the Act requires Qwest to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its application.<sup>329</sup> Thus, the Commission has a responsibility not only to ensure that Qwest is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.<sup>330</sup>

95. Working in concert with the Minnesota Commission, we intend to closely monitor Qwest's post-approval compliance for Minnesota to ensure that Qwest does not "cease [] to meet any of the conditions required for [section 271] approval."<sup>331</sup> We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in these states. We are prepared to

<sup>328</sup> See *Declaratory Order*, 17 FCC Rcd 19340-41, para. 8 (stating that the Commission's standard for the types of agreements that must be filed "recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs.").

<sup>329</sup> 47 U.S.C. § 271(d)(6).

<sup>330</sup> *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, paras. 446-53.

<sup>331</sup> 47 U.S.C. § 271(d)(6)(A).

use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

96. We require Qwest to report to the Commission all Minnesota carrier-to-carrier performance metrics results and PAP monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, Qwest's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into Minnesota.<sup>332</sup>

## IX. CONCLUSION

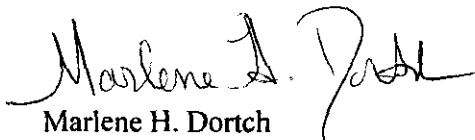
97. For the reasons discussed above, we grant Qwest's application for authorization under section 271 of the Act to provide in-region, interLATA services in Minnesota.

## X. ORDERING CLAUSES

98. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 271, Qwest's application to provide in-region, interLATA service in the state of Minnesota filed on March 28, 2003, IS GRANTED.

99. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE July 7, 2003.

FEDERAL COMMUNICATIONS COMMISSION

  
Marlene H. Dortch  
Secretary

<sup>332</sup> See, e.g., *Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of \$3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specified performance standards and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems).